

JUL 16 1951

CHARLES ROBERT COOPER
CHIEF

No. 15 Miscellaneous

United States Court of Appeals of the United States
October Term, 1951

THE EAST CONFERENCE ET AL., PETITIONERS

v.

United States of America, Respondent
Federal Maritime Board, Intervenor-Respondent

ON MOTION FOR LEAVE TO FILE A PETITION FOR A WRIT OF
CERTIORARI TO THE UNITED STATES COURT FOR THE
DISTRICT OF NEW JERSEY

MOTION FOR RESPONDENT FEDERAL MARITIME BOARD

INDEX

	Page
Opinion Below	1
Jurisdiction	1
Statutes Involved	1
Questions Presented	1
Statement	3
Argument	3
(a) This is a proper case for allowance of the writ.....	1
(b) The assumption of jurisdiction by the District Court, or in any event the exercise of such jurisdiction if it exists, should be restrained by this court.....	6
(c) The complaint fails to state a cause of action in the ab- sence of an allegation that plaintiff resorted to pro- ceedings before the Board before instituting the pres- ent suit.....	10

CITATIONS

Cases:	
<i>Alabama Public Service Commission v. Southern Railway Co.</i> , 341 U. S. —, 71 S. Ct. 762.....	9
<i>Central Transfer Co. v. Terminal R. R. Ass'n</i> , 288 U. S. 469.....	11
<i>General American Tank Car Corp. v. El Dorado Terminal Co.</i> , 308 U. S. 422.....	9
<i>Georgia v. Pennsylvania R. R. Co.</i> , 324 U. S. 439.....	11
<i>Helvering v. Stockholm Enskilda Bank</i> , 293 U. S. 84.....	7
<i>Isbrandtsen Co., Inc. v. United States</i> , 81 F. Supp. 544, app. dismissed 336 U. S. 941; 96 F. Supp. 883.....	4, 5
<i>Isthmian S. S. Co. v. United States</i> , 53 F. 2d 251.....	8
<i>Montana-Dakota Utilities Co. v. Northwestern Public Service Co.</i> , 341 U. S. 246.....	9, 10
<i>Smith v. Hoboken R. R. Co.</i> , 328 U. S. 123.....	9
<i>Stanley v. Schwalby</i> , 147 U. S. 508.....	7
<i>United States v. Cooper Corp.</i> , 312 U. S. 600.....	7, 8
<i>United States v. Far East Conference</i> , 94 F. Supp. 900.....	1
<i>United States v. Interstate Commerce Commission</i> , 337 U. S. 426.....	7
<i>United States v. New York Central R. R.</i> , 272 U. S. 457.....	8
<i>United States v. Railway Express Agency</i> , 89 F. Supp. 981.....	9
<i>United States Alkali Ass'n v. United States</i> , 325 U. S. 196.....	9
<i>United States Navigation Co. v. Cunard</i> , 284 U. S. 474. 6, 7, 8, 9, 10, 11	

II

	Page
Statutes:	
Clayton Act, Sec. 16 (15 U. S. C. 26)	7
Interstate Commerce Act, Sec. 9 (49 U. S. C. 9)	7
Sherman Act, Secs. 1, 2 and 4 (15 U. S. C. 1, 2, 4)	1, 2
Shipping Act, Section 14 Third (46 U. S. C. 812 Third)	5
Shipping Act, Secs. 15 and 22 (46 U. S. C. 814 and 821)	1, 2, 3,
	7, 8, 11, 12
Miscellaneous:	
Maritime Board Rules of Practice (Title 46 C. F. R. Sec. 201.81)	7
Reorganization Plan 21 of 1950 (15 F. R. 3178)	2

In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 15 Miscellaneous

FAR EAST CONFERENCE ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, RESPONDENT
FEDERAL MARITIME BOARD, INTERVENOR-RESPONDENT

ON MOTION FOR LEAVE TO FILE A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT FOR THE DISTRICT OF NEW JERSEY

BRIEF FOR RESPONDENT FEDERAL MARITIME BOARD
OPINION BELOW

The opinion of the District Court is reported at 94 F. Supp. 900.

JURISDICTION

The basis of this Court's jurisdiction to issue the writ is set forth at page 3 of the Petition.

STATUTES INVOLVED

Sections 1, 2 and 4 of the Sherman Act (15 U. S. C. 1, 2, 4); sections 15 and 22 of the Shipping Act (46 U. S. C. 814, 821).

QUESTIONS PRESENTED

Petitioning steamship carriers organized themselves into a conference by means of an agreement

approved by Federal Maritime Board¹ under section 15 of the Shipping Act (46 U. S. C. 814). The conference published a tariff containing two levels of freight rates, the lower rates being available only to shippers who agree to patronize member lines of the conference exclusively. The United States, through the Antitrust Division of the Department of Justice, sued to enjoin such dual rate system under section 4 of the Sherman Act (15 U. S. C. 4). Petitioners moved to dismiss the complaint. The District Court denied the motions. The case presents the following questions:

- (a) Did the District Court have jurisdiction of the suit in the absence of prior resort by the Attorney General to a proceeding before the Board?
- (b) If the District Court had jurisdiction, did it abuse its discretion in exercising such jurisdiction by refusing to dismiss the complaint?
- (c) Does the complaint state a cause of action for injunctive relief under section 4 of the Sherman Act in the absence of an allegation that relief was first sought in a proceeding before the Board?

¹ Federal Maritime Board, established by Reorganization Plan 21 of 1950 (15 F. R. 3178) administers the Shipping Act, 1916, as successor to the Shipping Board, the Shipping Board Bureau of the Department of Commerce and the United States Maritime Commission. Each of these establishments is referred to herein as the Board.

STATEMENT

The case is accurately stated at pages 3-5 of the petition.

The Board intervened as a defendant in the District Court proceedings (R., pp. 94, 96, 97), and moved to dismiss the complaint (R. 93) on the ground that (a) the District Court lacked jurisdiction over the subject matter of the action and (b) the complaint failed to state a claim upon which relief could be granted. Its intervention and motion were based on the contention that the complaint related to matters committed by law to the Board's exclusive preliminary jurisdiction. The Board's motion was denied, as were similar motions by the defendant carriers (R., p. 104).

The Board did not file a petition for certiorari to review the order of the District Court. It was, however, named as respondent in the petition filed by the Far East Conference and its members. The Board is of opinion that the petition is well taken and that for the reasons therein and herein set forth, it should be granted.

ARGUMENT

(a) *This is a proper case for allowance of the writ.*

The basic reasons for allowing the writ are well stated in the petition. Several others suggest themselves and deserve brief mention.

4

The activities attacked by the complaint consist of a rate-making practice in ocean commerce commonly known as the "exclusive patronage," or "contract/non-contract" or "dual rate" system, by which conferences functioning under agreements approved by the Board under section 15 of the Shipping Act (46 U. S. C. 814)—which agreements after such approval are excepted from the antitrust laws—establish two scales of rates in their tariffs, the "contract" scale being lower than the "non-contract," usually by a percentage differential. The contract rates are paid by shippers who agree to ship in a particular trade by conference lines exclusively. The higher "non-contract" rates are paid by shippers who do not thus promise their exclusive patronage to the conference.

Depending upon the circumstances involved, the Board has sometimes forbidden and more often permitted the use of the dual rate system, and much of the foreign commerce of the United States is now conducted on the basis of contract and noncontract rates.

The dual-rate system has been a subject of controversy before the Board for many years, and has recently come under direct attack in the courts in two actions: (1) the present suit; and (2) *Isbrandtsen Co., Inc. v. United States* (S. D. N. Y.) 81 Supp. 544, app. dismissed 336 U. S. 941; 96 F. Supp. 883. *Isbrandtsen* is now docketed in this court on appeal by the Board and

others from the final order of a three-judge District Court enjoining use of the dual-rate system in the North Atlantic trade (96 F. Supp. 883).

Whereas in the present case the Attorney General challenges the system under the antitrust laws, *Isbrandtsen* involves an attack by a private plaintiff *not* under the antitrust laws but under section 14 Third of the Shipping Act (46 U. S. C. 812 Third). Since in *Isbrandtsen* the United States was a statutory defendant, the Board's orders were "defended" by the Attorney General through the Antitrust Division, the purported defense consisting of a confession of the Board's error. The Secretary of Agriculture intervened in the plaintiff's support.

Although the present case and *Isbrandtsen* present different, or at least potentially different issues, they are in substance complementary suits, dealing with related phases of a single basic subject—i. e., the lawfulness of the dual-rate system. The pendency of the *Isbrandtsen* appeal affords a convenient opportunity to review that case and this at the same time. In so doing, this court would serve a substantial public interest by furnishing final answers to unsettled questions of urgent concern to an important regulated industry, to the shipping public, and to the regulating agency.

The serious character of the issues involved is attested by the fact that this case has precipitated a judicial contest between the Board and the

Attorney General and that in *Isbrandtsen*, issue was joined not only between the Board and the Attorney General but between the Board and the Secretary of Agriculture as well.

(b) *The assumption of jurisdiction by the District Court, or, in any event, the exercise of such jurisdiction if it exists, should be restrained by this court.*

United States Navigation Co. v. Cunard, 284 U. S. 474, if it applies to this suit by the Government, means that the District Court is without jurisdiction, since the Court therein held (284 U. S. at 485) that the lawfulness of the dual-rate system, even when attacked under the Sherman Act as distinguished from the Shipping Act, was a question "within the exclusive preliminary jurisdiction of the Shipping Board," and that

"* * * Congress undoubtedly intended that the Board should possess the authority primarily to hear and adjudge the matter. For the courts to take jurisdiction in advance of such hearing and determination would be to usurp that authority."

(p. 487)

The District Court thought that the Government, as distinguished from a private suitor, could not be forced to resort to an administrative remedy before the Board, because no such remedy was available to it—for the reason that proceedings before the Board are authorized upon the complaint of any "pers.?" (Shipping Act, sec.

22, 46 U. S. C. 821); and in the view of the District Court the United States is not a person. There is no such general rule. See *Helvering v. Stockholm Enskilda Bank*, 293 U. S. 84, 92-94; *Stanley v. Schwalby*, 147 U. S. 508, 517.

In *United States v. Interstate Commerce Commission*, 337 U. S. 426 (affirming 78 F. Supp. 580) the Government was recognized as a "person" entitled to maintain a complaint proceeding before the Interstate Commerce Commission under section 9 of the Interstate Commerce Act (49 U. S. C. 9)—a close counterpart of section 22 of the Shipping Act. See *United States Navigation Co. v. Cunard*, *supra*, p. 481. Further, the Government's status as a person, even under the antitrust laws, is implied (notwithstanding *United States v. Cooper Corp.*, 312 U. S. 600) by section 16 of the Clayton Act (15 U. S. C. 26) authorizing injunctive relief but providing that "nothing contained in sections 12, 13, 14-21, 22-27 of this title shall be construed to entitle any person, firm, corporation, or association, except the United States," to sue in equity for injunctive relief against common carriers regulated by the Interstate Commerce Commission.

The Maritime Board has on several occasions authorized intervention by the Attorney General in proceedings before the Board dealing with the dual rate system—a circumstance noted, but deemed immaterial, by the District Court. The Board's rules of practice (title 46 C. F. R., sec.

201.81) refer to interveners as "persons." Thus, the Government has been recognized as a person under the Shipping Act; and the administrative practice is entitled to respect in determining whether the Government is within the scope of a statute. *United States v. Cooper Corp., supra*, p. 605.

But whether the Attorney General has an unqualified legal right to file a complaint is unimportant. Section 22 of the Shipping Act authorizes proceedings by the Board on its own motion, and the Board hears the Attorney General when he asks to be heard. Its proceedings would be valid even if initiated on a complaint that the complainant had no standing to file. *United States v. N. Y. Central R. R.*, 272 U. S. 457, 462; *Isthmian S. S. Co. v. United States* (S. D. N. Y.), 53 F. 2d 251, 253. Since the Board would hear the Attorney General if asked to do so, his preliminary resort to the agency, under the *United States Navigation* doctrine, should not be waived.

Our contention is that in the absence of a proceeding first initiated before the Board, the District Court lacked jurisdiction of the cause. We take this position in reliance on what we consider to be the inescapable meaning of the *United States Navigation* decision. But if we are wrong, and *United States Navigation* does not establish a complete absence of jurisdiction in the District Court, it means at least that the exercise of juris-

diction by the District Court would be improper unless the controversy had been first submitted to the Board. See *Smith v. Hoboken R. R. Co.*, 328 U. S. 123, 129; *General American Tank Car Corp. v. El Dorado Terminal Co.*, 308 U. S. 422, 428; *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U. S. 246; *United States v. Railway Express Agency* (D. C., Del.) 89 F. Supp. 981. Compare *Alabama Public Service Commission v. Southern Railway Co.*, 341 U. S. —, 71 S. Ct. 762.

We have said that *United States Navigation* is a controlling precedent if it applies to suits by the Government. We see no reason for applying a different rule in civil cases where the Attorney General, acting through the Antitrust Division, is plaintiff, than in suits by private plaintiffs. Every reason stated in *United States Navigation* for dismissing the complaint there involved applies with equal force to the complaint in this suit. Further, this Court said in *United States Alkali Ass'n v. United States*, 325 U. S. 196, 204, that for a court to act in the first instance in a matter committed to administrative determination would involve "a frustration of the functions which Congress has directed the Commission to perform and of policy which Congress presumably sought to effectuate by their performance." This reasoning was applied to a civil antitrust suit by the United States and clearly means that as to matters within the primary jurisdiction of an

administrative body, the courts may not act, even at the Attorney General's behest, until the agency has acted.

(c) *The complaint fails to state a cause of action in the absence of an allegation that plaintiff resorted to proceedings before the Board before instituting the present suit.*

This Court recently noted in *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, *supra* (341 U. S. at 249) that

"As frequently happens where jurisdiction depends on subject matter, the question whether jurisdiction exists has been confused with the question whether the complaint states a cause of action."²

In the present case, the defendant carriers moved to dismiss the complaint for want of jurisdiction in the Court and for failure of the complaint to state a cause of action (R., pp. 72-75); and a similar motion was made by the Board (R., p. 95). As heretofore noted, *United States Navigation* indicates that the jurisdictional objection is well-founded. *Montana-Dakota*, on the other hand, held on facts somewhat resembling those now before the Court, that the disability of a District Court to award relief under the Federal Power Act resulted not from a juris-

² In *Montana-Dakota*, the defendant moved to dismiss the complaint "for want of jurisdiction in that it failed to state a claim under federal law." 341 U. S. at 256.

dictional deficiency but from failure of the complaint to state a cause of action where the controversy, if litigable at all, would have been the sole concern of the Power Commission.

This Court concluded that the Power Commission could not have awarded the relief that plaintiff sought, but even so, the complaint (for reparations) in the District Court was held dismissable. The same result would have been indicated with even greater certainty had the case been one where the Power Commission had, as the Board indubitably has here, plenary power to grant a remedy. Shipping Act, sec. 22, 46 U. S. C. 821; *United States Navigation Co. v. Cunard, supra.*

This is not such a case as *Georgia v. Pennsylvania R. R. Co.*, 324 U. S. 439, which allowed the State to sue, as *parens patriae*, to enjoin antitrust violations by several railroads. That suit was permitted solely because the Interstate Commerce Commission had "no power to afford relief" from a conspiracy among the railroads (pp. 444, 455). The decision indicates definitively that if the Commission had had such power, this Court would have rejected Georgia's complaint for failure to state a cause of action. Compare *Central Transfer Co. v. Terminal R. R. Ass'n*, 288 U. S. 469.

Where, as here, the Board has jurisdiction to approve and has in fact approved the carrier's conference agreement, in consequence of which

the agreement is excepted from the antitrust laws (see Shipping Act, sec. 15, 46 U. S. C. 814), and the Board is empowered to investigate the acts set forth in the complaint and "to make such order as it deems proper"—i.e., to afford a complete remedy (Shipping Act, sec. 22, 46 U. S. C. 821)—the doctrine of preliminary resort to the agency applies with full force. To hold otherwise would be to cripple the Board in the exercise of a basic function lodged with it by statute, and to substitute the Antitrust Division for the Board as the administrative supervisor of conference activities. Since the complaint demands relief that the Board alone may grant in the first instance, it should be dismissed for failure to state a claim on which judicial relief can be awarded.

Accordingly, we join with petitioners in requesting that their petition for a writ of certiorari be granted.

Respectfully submitted,

FRANCIS S. WALKER,

General Counsel,

GEORGE F. GALLAND,

Attorneys for Respondent Federal Maritime

Board,

WASHINGTON 25, D. C.

JULY 6, 1951.